Caselaw Update

November 18, 2005

John P. Dockery, Jr.

Buchholz v. Buchholz,

166 S.W.3d 146 (Mo.App. S.D. 2005), SD EN BANC Decided: 07/07/05

Child Support
Form 14
Imputed Income-Underemployed

Husband had run a business that started failing prior to the dissolution. It failed before the dissolution was granted. The trial court imputed income to Husband based on his previous earnings. He appealed the appellate court reversed.

"Husband's 'probable' earnings based on an earnings history, employment potential, and 'available' job opportunities in the 'community' are of particular significance here.

"A parent must have the capacity to earn income which is imputed to him or her, and an award of child support must be supported by evidence of the parent's ability to pay. [Cite omitted.] The record in this case does not support the conclusion that Husband's 'probable' earnings are in the range of $145,000. Granted, Husband previously made that much income.... Proof, however, that a parent has previously made more money is not alone a sufficient basis upon which to impute income at those levels. [Cites omitted.]

"...

"... There was no evidence, however, that Husband had made less than a good faith effort to obtain employment. He moved to Independence, Kentucky, and sent at least thirty resumes to prospective employers in the general area in addition to contacting others. As a result of his contacts, he had at least twenty-two interviews and received but one job offer ... which he accepted. He had worked there since October 2002 earning $36,000 annually. According to the evidence, many of the businesses with whom he applied were looking for someone with a college degree, whereas he has only two years of college.

"The trial court noted that Husband's efforts to find better employment should not necessarily be restricted to the area where he lives. There was no evidence that Husband would have had more success finding a better paying job in another geographical location. Additionally, we are not aware of any authority that would support an imputation of income because a spouse failed to seek employment in a particular community or geographical area.

"...

"... The trial court did not find, and we see nothing in the record to indicate, that Husband's diminished income was the result of a deliberate or voluntary attempt to avoid his support obligations to his family. '[I]t is axiomatic that there must be evidence to support a finding that the parent is deliberately limiting his or her work to reduce income before it is appropriate to impute income.' [Cite omitted.] 'Courts should not impute income where the record does not establish an attempt to evade parental responsibilities.' [Cite omitted.]" pp. 153-56 [5-6]

Child Support
Medical Expenses
Percentage

The trial court ordered Husband to pay 85% of the uncovered medical expenses of the children. His percentage of the total income was less than that percentage. He appealed. The appellate court upheld this provision, but reversed on other grounds.

"[The caveat to line 6d of the 1998 version of Form 14] does not necessarily lead to the conclusion that a parent's share of the uninsured medical expenses from children must be the same percentage as determined in the child support calculations. Accordingly, this point is denied." p. 159

In Re Marriage of Denton,
169 S.W.3d 604 (Mo.App. S.D. 2005), SD Decided: 08/31/05

Jurisdiction
Child Support
Juvenile Court

At the time of the dissolution the juvenile court was exercising jurisdiction over the child of the marriage. The trial court ordered support and custody. Wife appealed claiming that the support amount was in error.

"In the case at bar, it is undisputed that Daughter was subject to the jurisdiction of the juvenile division when the Dentons' dissolution action was tried. That being the case, the juvenile division's jurisdiction was paramount and superseded the jurisdiction of any other court to decide the issues of Daughter's custody and support. See Ogle v. Blankenship, 113 S.W.3d 290, 291-92 (Mo. App. 2003).

"For the reasons stated above, the trial court did not have jurisdiction to adjudicate the issues of child custody, visitation and child support. Accordingly, the pronouncements in the judgment concerning these three issues, being null and void, are reversed. [Cite omitted.] The case is remanded to the trial court with instructions to vacate those portions of the judgment addressing the issues of child custody, visitation and child support. In all other respects, the judgment of the trial court is affirmed." p.613

Perry v. Aversman,
168 S.W.3d 541 (Mo.App. W.D. 2005), WD Decided: 04/26/05

General
Local Court Rule

A local court rule allowed the clerk to deduct from a cash bond costs and fines assessed in the criminal case. The clerk deducted the money from the bond. The attorneys who had been assigned the bond money by the defendants sought declaratory judgment that the rule was void. The trial court held the rule void. The appellate court held that the rule was not void, but that it could not be enforced since the bond did not advise the defendant that the costs and fines could be deducted from the bond.

"A local rule is inconsistent if it specifically prohibits something the Supreme Court Rules permit, or vice versa."

Criminal Cases
Bail
Portion Retained

A local court rule allowed the clerk to deduct from a cash bond costs and fines assessed in the criminal case. The clerk deducted the money from the bond. The attorneys who had been assigned the bond money by the defendants sought declaratory judgment that the rule was void. The trial court held the rule void. The appellate court held that the rule was not void, but that it could not be enforced since the bond did not advise the defendant that the costs and fines could be deducted from the bond.

"Although case law and tradition indicate the primary purpose and condition of bail bonds and cash bail bonds is to reasonably assure the presence of the accused in court until the final disposition of the case, the trial court may impose additional conditions before releasing the defendant on bond, such as for subsequent payment of costs and fines. However, if the trial court wishes to do so, specific language to that effect must be made a part of the conditions of the pre-release bond or, at a minimum, an acknowledgment thereof made by the defendant, or person posting the cash deposit. Here, the procedures employed by Lafayette County do not provide sufficient notice to people who post the bail amount.

"To be enforceable for the purpose of retaining all or a portion of deposited funds on a cash bail bond, the clerk of the circuit court must outline in the receipt given to the depositor that delineated unpaid costs, fines, and expenses may be deducted before a refund will be made. Although an argument can be made that such notice of what items can be deducted for reason of nonpayment by the defendant must be in the bond itself, substantial compliance may be had for

implementation of a local rule similar to the one at bar by notice in the bond receipt or by written acknowledgment in an approved bond assignment." pp. 545-46[4-6]

State ex rel. Estate of Perry v. Roper,
168 S.W.3d 577 (Mo.App. W.D. 2005), WD Decided: 05/24/05

Appeals
Dismissal
Lack of Jurisdiction

"Where a trial court has dismissed a case on the ground that it lacked subject matter jurisdiction, the trial court's dismissal of the action is appealable because the effect of the order is to dismiss the plaintiff's action and not merely the pleading. Sexton v. Jenkins & Assocs., Inc., 152 S.W.3d 270, 273 (Mo. banc 2004)." p. 583 [13-14]

Soldiers and Sailors
SCRA

Appellant was on active dot y in the military when his father died. Appellant filed his petition for the presentment of his father's will more than one year after his father had died. The trial court held that such filing was out of time and denied his petition. He appealed claiming that the statute was a statute of limitation and that the SCRA tolled its running while he was in the military. The appellate court reversed and remanded the case to the probate court for that court to determine whether appellant was, in fact, serving in the military after his father's death.

In Re Marriage of Macomb,
169 S.W.3d 191 (Mo.App. S.D. 2005), SD Decided: 08/22/05

Default Judgment
Set Aside
Good Cause

The parties were living together when husband was served. Wife moved out shortly after the dissolution. Husband found out about the default when he called the clerk's office almost 2 months later. He moved to set aside the judgment and claimed that he relied on his wife to tell him when the hearing would be. Wife's testimony at the motion was that she had always answered his questions regarding the dissolution truthfully. The trial court denied the motion. He appealed.

"Here, ..., the trial court did not set aside the judgment nor did it find any misleading statements by Respondent. All fact issues not expressly found are deemed found in accordance with the Result. [Cite omitted.] ... The trial court could have found that Appellant acted recklessly in failing to read the summons, or it may not have believed Appellant's purported reliance on Respondent's statements or found that Appellant's reliance on an adverse party's statements was reckless. Appellant's inattention to the proceedings bars him from showing good cause. Appellant has not shown good cause to set aside the default judgment." p. 194

State v. Link,
167 S.W.3d 763 (Mo.App. W.D. 2005), WD Decided: 07/26/05

Criminal Nonsupport
Adequate Support

Defendant was charged with criminal nonsupport for the period 1/1/99 through 1/1/02 and having an arrearage over $5,000. The evidence showed that he had been incarcerated for 9 months during that 36 month period and that mother had received more than $6,000 from Link's personal injury settlement proceeds. He argued that since the money

had been received by mother during the 27 months that he was not incarcerated and since his child support was $5,400 during that period that he had provided adequate support. The appellate court affirmed his conviction.

"Link claims on appeal that there was insufficient evidence to prove the third element of "adequate support" for the time period charged because the State failed to show that the $6,892.37 Mother received during the time period charged was not "adequate support" for the child. We disagree.

"...

"There is argument from both sides as to whether the payments of $6,892.37 should be either applied to Link's child support arrearages or applied to the current child support owed during the time charged. We conclude that it is irrelevant how these payments are applied because either way Link's argument fails.

"...

"... At the time that Mother received the lump sum garnishment in March 2001, Link had already failed to provide support for his child for more than six months out of a twelve-month period. His child had basic needs during each of these months, and Link failed to adequately support those needs as they arose. It would not be logical or sound to excuse Link's failure to adequately support his child for those months because of the subsequent involuntary payment on his arrearages. In addition to those months of nonpayment, Link also failed to provide support for seven months after he was released from the county jail in June 2001. The March 2001 lump sum proceeds from the garnishment of Link's personal injury settlement cannot simultaneously be applied to both past and future obligations. These long gaps in meeting his legal responsibility constitute sufficient evidence to support Link's conviction." pp. 766-7 [2-5]

Epperson v. Eise,

167 S.W.3d 229 (Mo.App. E.D. 2005), ED Decided: 07/12/05

Default Judgment
Failure to Appear for Trial
Set Aside

Damage suit with cross claims filed by each party. Neither Plaintiff nor their attorney appeared for trial. The court entered a "default and inquiry" and set the case for a hearing on damages for 2 days later. The following day the plaintiff filed a motion to set aside the default which was denied. The court assessed the damages. The plaintiff filed another motion to set aside the default judgment which was denied. The appellate court reversed the trial court's judgment.

"Although the underlying judgments are characterized as default judgments, they are not, but rather, they are judgments on the merits. As held by our Supreme Court, '[t]he rule continues to be that where a party ... files a petition, then files an answer to a cross-petition, but fails to appear for trial, the judgment is not a default judgment, but, rather, it is a judgment on the merits.' [Cite omitted.] ...

"As judgments on the merits, the trial court's judgments in this case cannot stand. It is well established that, as a general rule, a judgment must be supported by legally adduced evidence. [Cites omitted.] ... When there is no evidence to support a judgment, the judgment must be reversed and remanded. [Cites omitted.] Such is the case here. The court entered judgment against the Eppersons ... without any evidence of their liability being adduced. Eise and the trial court apparently assumed that an order of 'default and inquiry' was sufficient to establish the liability of the Eppersons. It is not. ... Because there is no evidence of the Eppersons' liability to support the court's judgments, the judgments cannot stand." p. 231 [1-6]

Windsor v. Windsor,

166 S.W.3d 623 (Mo.App. W.D. 2005), WD Decided: 07/12/05

Statutes - Missouri
452.340
Education - Requirements

Child Support
College
452.340 - Requirements

Husband filed motion to modify. The trial court ruled that child support was abated for failure to comply with the notice requirements of □452.340.5. Wife appealed. The appellate court affirmed the abatement, but reversed on other grounds.

"[Wife] ... claims that the trial court erred in abating child support for the fall 2001 and spring 2002 semesters, on the basis that the requirements of section 452.340.5 were not satisfied, because under the circumstances, any efforts by her to provide the information required by that statute would have been 'meaningless, futile, and without effect' due to the respondent's inaccessibility and lack of cooperation."

"... [S]he contends that the intent of section 452.340.5 is not thwarted where, as in her case, no attempt is made to contact the child support obligor to provide the required information because any efforts to contact him would be futile, and he is not paying child support as ordered and has shown no interest in the child's education. In other words, she is claiming no harm, no foul.

...

"The record here supports the fact that [wife] had various avenues in which to make a good faith effort to inform [husband] of the information required by section 452.340.5, concerning [child]'s classes and progress at UMKC. She could have sent the required documentation to his last known address or to his attorney of record. She chose to do nothing, which violates both the spirit and the letter of section 452.340.5. As such, the trial court was justified in abating the respondent's child support obligation for fall 2001 and spring 2002 semesters." pp 632-33

Child Support
Form 14
Rebutted

Appeals
Reversal
Evidence After

Husband filed motion to modify. The trial court accepted his Form 14 showing a PCSA of $473. The court rejected that amount as unjust and inappropriate, denied his motion, and left the child support at $1,200 per month. Husband appealed this issue and wife appealed other issues. The appellate court reversed on this issue.

"As the party benefiting from the trial court's upward deviation from the PCSA, even if she did not request it, [wife] had the burden to show the need for deviating from the PCSA. [Cite omitted.] This burden would have included demonstrating that [the child]'s financial needs exceeded the PCSA. [Cite omitted.] However, [wife] failed to meet her burden in that there is no evidence in the record of [the child]'s financial needs. There is no evidence of her expenses, the cost of college, or her resources from employment or elsewhere. Because the record is devoid of any evidence of [the child]'s financial needs over and above the PCSA, the trial court erred in rebutting the PCSA which it found to be $473, ...

"... Hence, in reversing the trial court's denial of the respondent's amended motion to modify child support, the question still remains for the court on remand, from the evidence already presented, whether there has been a substantial and continuing change of circumstances, requiring modification of the existing child support order. In doing so, however, the trial court is not permitted to reconsider its PCSA determination of $473 or allow the appellant the opportunity to present further evidence to rebut that amount. The appellant had the burden of rebutting the PCSA of $473. She failed in that burden and, as a matter of due process, should not be allowed a second bite of the apple on remand." p. 635-36 [22-24]

In Re E.F.B.D.,

166 S.W.3d 143 (Mo.App. S.D.), SD Decided: 07/05/05

Appeals
Mandate

Jurisdiction
Trial court
After Appeal

TPR case. Father appealed. The appellate court issued its decision reversing the trial court on July 8. The mandate was issued on July 27. The trial court held a hearing and entered a new judgment on July 14. Father appealed. The appellate court reversed.

"... The trial court lost all jurisdiction in this matter subsequent to the filing of the appeal and did not regain jurisdiction until our mandate was issued.

"When a notice of appeal is filed, the trial court loses jurisdiction of the case and may only exercise purely ministerial or executive functions. [Cite omitted.] The circuit court may only act judicially after the appellate court rules and returns the case. [Cite omitted.] According to State ex. rel. McGrew Coal Co. v. Ragland, 97 S.W.2d 113, 115 (Mo. banc 1936), 'No proceeding can be had in the lower court until the mandate has been filed in such court, or at least issued.' The trial court is re-vested with jurisdiction when the mandate is issued or filed in the lower court. [Cites omitted.] Proceedings

of a judicial tribunal that has no jurisdiction to act are absolutely void. [Cite omitted.] 'Where the judgment of an appellate court calls for the remand of the cause to the trial court for further action the judgment is not self-executing but must be certified back to the trial court for execution.' [Cite omitted.].

"As abhorrent as it is to delay the ultimate decision regarding this child, we have no choice but to dismiss this appeal because the trial court did not have jurisdiction to enter its judgment." p. 145-46 [2-7]

State ex rel. Ferrara v. Neill,
165 S.W.3d 539 (Mo.App. E.D. 2005), ED Decided: 06/28/05

Uniform Child Custody Juris. Custody
Parental Kidnapping Prevention

Parties divorced in New Mexico. Mother still resides in New Mexico. Father lives in Missouri. The child resides with Father in Missouri. Father registered the New Mexico order and then sought to have the Missouri court grant him custody. Mother moved to dismiss claiming that Missouri did not have jurisdiction. The trial court denied her motion. She sought prohibition. The appellate made the writ absolute.

"Under the UCCJA, Missouri may modify another state's custody decree only if it has jurisdiction and the original decree state no longer has jurisdiction 'under jurisdictional prerequisites substantially in accordance with sections 452.440 to 452.550' or has declined jurisdiction. Section 452.505, RSMo 2000; Adams v. Adams , 871 S.W.2d 105, 107 (Mo. App. E.D. 1994). However, the PKPA provides that once a state exercises child custody jurisdiction consistently with its provisions, that state retains jurisdiction to modify child custody so long as one parent or the child continues to reside in that state and such state continues to have 'jurisdiction under the law of such State.' 28 U.S.C. sec. 1738A(d) & (c)(1). It further provides that a court may modify a determination of child custody made by another State only if: '(1) it has jurisdiction to make such a child custody determination; and (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.' 28 U.S.C. sec. 1738A(f).

"In her suggestions in support, Mother argues that a Missouri court does not have jurisdiction to modify the New Mexico decree. She asserts that the PKPA provides continuing jurisdiction to the New Mexico court, so long as one of the parents remains in New Mexico. In his suggestions in opposition, Father relies primarily upon the UCCJA to support his argument that Missouri has 'concurrent' jurisdiction with New Mexico, and that as Child's home state, Missouri can modify the New Mexico decree. He contends the UCCJA is not in conflict with the PKPA in this regard. He also argues that the PKPA does not apply because there are no simultaneous proceedings pending in New Mexico.

"It is undisputed that Mother resides in New Mexico and that New Mexico has not been asked to decline jurisdiction or to assess whether it has continuing jurisdiction under its law. Mother does not dispute the assumption that Missouri has jurisdiction under the UCCJA to modify the New Mexico decree. However, she asserts even if Missouri has jurisdiction under the UCCJA, the PKPA preempts the UCCJA and requires the Missouri court to defer to the jurisdiction of New Mexico.

"We agree with Mother's analysis. Arguably, the UCCJA would provide Missouri with jurisdiction to modify the New Mexico custody decree as Child's home state. However, as explained in more detail below, Missouri would not have jurisdiction under the PKPA, because Missouri is required to examine New Mexico's law, which provides New Mexico with exclusive, continuing jurisdiction. To the extent the PKPA and the UCCJA conflict, the Supremacy Clause of the United States Constitution mandates that the PKPA preempts the UCCJA. [Cite omitted.] Therefore, in this instance, the PKPA preempts the UCCJA and the UCCJA provisions of the Missouri law governing modification are not applicable." p. 542 [5]